



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO 46 OF 2017

REPUBLICPROSECUTOR

VERSUS

DAVID MUCHIRI MWANGI ACCUSED

RULING

BACKGROUND

1. The applicant **DAVID MUCHIRI MWANGI** is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which are that on the 11th July, 2017 at about 7.50 hours at Fig Tree Medical Centre Ngara Area in Starehe Sub County within Nairobi County murdered **JARED RATEMO**.

2. He appeared before Hon. Justice Lesiit on 9/10/2017 when he took his plea and a plea of not guilty was entered therein for the purpose of this ruling on that date. Ms Mwaniki appeared for the prosecution, Mr. Nyangayo for the Accused while Mr. Ongaro watched brief for the Law Society of Kenya (LSK). On 17/10/2017 he appeared before Mutuku J and the records shows that Mr. Omari appeared for the family while on 1/11/2017 the court record shows that Ms Kagwa was watching brief for the family of the deceased (wife) Mr. Omari for the siblings and father of the deceased while Mr. Ongaro was still on record watching brief for LSK.

3. On 6/11/2017 the Applicant filed a Notice of Motion to be admitted to bond pending trial and final determination of the cause and on 20th November, 2017 the Law Society of Kenya through its secretary and Chief Executive Mercy Wambua filed a replying affidavit and opposed the said application.

4. On 14/12/2017 the matter was placed before me by the presiding judge of the Criminal Division for purposes of fixing a suitable date for the hearing of the application for bond and on that date the Coram was:- Mr. Meroka for the State, Nyangayo for the applicant and Mr. Ongaro for the LSK when the application for bond was fixed for 24/1/2018 with an order that the Respondents to file their responses before the said date upon which Mr. Ongaro for the Law society confirmed that he had filed a response and was going to oppose the application. He further informed the court that Mr. Omari who had earlier indicated that he would not oppose bond had changed and indicated that he intended to now oppose bond.

5. In the meantime on 28/12/2017 Dr. Khaminwa Senior Counsel filed a Notice of Appointment of Advocates on behalf of the accused and on 29th December, 2017 it appears from the record that the file was placed before Mutuku J then Vacation Judge who directed that all counsels in the matter be served for 3rd January, 2018 when the parties appeared before Justice Ngenye when the appearance was:- Dr. Khaminwa (SC) for the accused, Mr. Meroka for the State and Mr. Ongaro for the Law Society. At the said appearance Dr. Khaminwa told the judge that pushing the hearing of the application for bail on 24/1/2018 was an injustice to the accused person as the application for bail should be heard promptly. From the record the Judge declined to vary the date.

6. It is noted that at all time through this proceeding there has not been an objection raised in respect of the appearance of the parties herein.

OBJECTION

7. When this matter appeared before me on 24/1/2018 for hearing of bail application the appearance of the parties remained as follows:-

Dr. Khaminwa/Nyangayo for accused

Mr. Meroka for the State

Mr. Ongaro for the LSK

Mr. Letoro for the wife of the deceased

Mr. Omari for the sibling and father of the deceased

8. Upon completion of the submissions by Mr. Meroka for the state, the court then invited Mr. Ongaro for the Law society to make his submissions upon which Dr. Khaminwa in his usual style of being passionate in an undertaking took an objection to the participation of Mr. Ongaro, Mr. Litoro and Mr. Omari at this stage of the proceedings.

SUBMISSIONS

9. Dr. Khaminwa submitted that there must always be equality of arms between parties to a criminal proceeding and that the complainant is being represented by the Office of Director of Public Prosecution and therefore the Law Society can only be involved in the trial as an observer. He submitted that the lawyer for the family cannot be allowed to address the court same with the lawyer for the law society. He submitted that under **Article 50(9)** of the Constitution parliament was only mandated to pass a legislation in respect of the rights and welfare of the victims.

10. Mr. Ongaro for the law society submitted that the deceased was an Advocate and having been killed after the now famous Willy Kimani case the law society felt victimized. He referred the court to **Section 2** of the **Victim Protection Act** on the definition of a victim and **Halsburys Laws of England** and submitted that it includes corporate entity or individual. He submitted that the deceased was a member of the Law Society who feels that they are being targeted thereby making it a victim.

11. Mr. Omari for the father, mother and siblings of the deceased submitted that they are victims since they were beneficiaries of the deceased. This position was also taken by Mr. Litoro for the wife and the children of the deceased who submitted that they were victims of the crime who ought to be heard.

12. From the submissions herein the following issues are identified for determination:-

a. Whether the victims have a right to be heard at the hearing of bail application.

b. Whether the law society, the wife and children and the father, mother and siblings of the deceased are victims.

c. To what extent should they be accorded a right of audience by the court.

13. The rights of the victims to participate on a criminal trial and to the extent to which they might be allowed to participate is an emerging issue in the Kenya criminal jurisprudence and has been subjected to court's determination as can be seen from the authorities submitted by Mr. Ongaro for the Law Society of Kenya **REPUBLIC v JOSEPH LENTRIX WASWA CR. CASE NO. 34/2014 BUNGOMA** and **REPUBLIC v FREDRICK OLE LEIMAN & OTHERS CR. CASE NO. 57/2016 NAIROBI** This court has had opportunity to express itself on the issue in the case of **REPUBLIC v TITUS NGAMAU MUSILA alias KATITU CRIMINAL CASE NO. 78/2014 NAIROBI** where the court stated as follows:-

*“The rights and interest of the victims in proceedings of a criminal nature under the provisions of the Victim Protection Act 2014 are only limited to situations where the court is making a determination in issue that affects them directly and has been stated well by Justice Abida Ali in the case of **REPUBLIC v JOSEPH LENTRIX WASWA Bungoma High Court Criminal Case No. 34 of 2014** thus:-*

“(24) As indicated earlier the subject is moot and there are conflicting High Court decisions on the subject as seen from authorities cited.

*(25) In **I.P Veronica Gitahi & P.C Issa Mzee Vs Republic Criminal Appeal No. 23 of 2016** the Court of Appeal sitting in Mombasa considered the subject and the decision of the trial court with approval where Muya J had stated;*

‘... will allow interventions only on matters of law at appropriate stages of the proceedings where and if necessary ... I will also allow submissions as need be. The victim while granted reasonable access the prosecution file is not allowed (sic) to add any point of fact or any evidence. In the present case file (sic) or to question witnesses.’

(26) The Court of Appeal did not interfere with the decision of the trial court and went further to consider the effects of the provisions of Article 2 (5), 50(7) and 9 of the Constitution 2010 and had this to say;

‘Articles 2 (5) and 50 (7) and (9) of the Constitution, 2010 heralded a new dawn apart from enjoining the courts to apply general rules of international law, the Constitution mandates the courts, in the interest of Justice to allow an intermediary to assist a complainant (or an accused) to communicate with the court, ...’

*(28) The rationale behind the emerging jurisprudence in line with the provision of the Constitution 2010 is well captured In the case of **Sathyavani Ponrani Vs. Samuel Raj(supra)** The issue before court was whether a victim is entitled to be heard and take part in a criminal trial or not. The Court considered the role of the prosecutor and that of the victim at length and made the*

following observations:-

“The public prosecution conducts the prosecution whereas a victim ventilates his grievance. A public prosecutor conducts the case with a sense of detachment whereas the victim is attached to the case. A decision made in a case does not impact a public prosecutor which is not the case with the victim who is the affected party.”

14. The **Witness Protection Act 2014** which was enacted by the National Assembly in realization of the rights of victims under **Article 50(a)** which provided that parliament shall enact legislation providing for the protection of rights and welfare of victims of offences provides in **Section 4(2)(b)** that:-

“Every victim is as far as possible given an opportunity to be heard and to respond before any decisions affecting him or her is taken.”

15. **Section 9(2)** of the Act provides:-

(2) Where the personal interests of a victim have been affected courts shall:-

a. permit the victims views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by court and

b. Ensure that the victims view and concerns are presented in a manner which is not

i Prejudicial to the right of the accused or

ii Inconsistent with a fair and impartial trial

(3) The victim’s views and concerns referred to in subsection

(2) May be presented by the legal representation acting on their behalf.

16. It is clear from the reading of the stated sections of the Victim Protection Act 2014 that the victims have a broader right to have their views heard at any stage of the trial where the court is making any decision that is likely to affect them and to receive information on the status of the case in which they are involved with the only limitation being that their participation does not affect the rights of the accused to fair trial. It is therefore clear that the objection by the Applicant to the participation of the victims at the stage of application for bond has no legal basis as the court is asked to make a determination on whether or not to release the accused on bond which decision might or might not have an effect on the rights and interest of the victim.

17. The issue as to whether the Law society, the wife and children of the accused and the parents and siblings of the deceased are victims to be heard at the stage of bond application, has been determined by Justice Lesiit in **REPUBLIC v FREDRICK OLE LEILMAN & OTHERS Nairobi High Court Criminal Case No. 57 of 2016.**

“39. An assessment of whether the personal interests of a victim have been affected must be viewed in the context of who a victim is as described above. The victims in this case were the deceased one who was an advocate, his client and a taxi driver. These are the subject matter of these proceedings. The victims are not limited to the three but include those who suffered loss and naturally include the wives and children of the deceased persons, their parents and other affected directly by these deaths like the LSK, Taxi Operators and BodaBoda Riders who were the colleagues of the three deceased persons in this case. Indeed these are the ones represented by Mr. Ojiambo, SC, Prof. Sihanya, Mr. Ongaro and Mr. Ahmed.

40. While considering whether to grant the accused bail in this caase I dealt with the issue of who are the victims in this case and held as follows:

“63. Apart from accused rights and public interest issues, there are other categories of rights which the court is mandated not to lose sight of. These are the rights of the victims of the offence or crime. The Victim Protection Act gives a broad definition of who victims are. They include the families of the ones against whom the offence was committed. It also includes those directly or indirectly affected by the offence.

64. In this case we have all these categories of victims. They include the family members of the deceased persons; the Law Society of Kenya, IJM, Witness Protection and taxi owners’ and boda boda fraternity. Others include a special category of Overseers, iPOA.”

41. In the case of ***IP GITAHU & ANOTHER*** (supra), the court of appeal held:

“By section 2 (VPA) a victim is defined to include any natural person who suffers injury, loss or damage as a consequence of an offence, a definition wide enough to include the deceased’s mother and uncle who are represented by Mr. Ndubi in this appeal... it would be unconscionable of us to deny him audience in this court when he was allowed, on specific terms to participate in the trial court.”

42. This case buttresses the courts finding that these category of persons before this court as victims qualify and meet the threshold of a victim as defined under **section 2** of the **VPA** which describes victim as '**any natural person who suffers injury, loss or damage as a consequence of an offence.**'

43. The victims thus qualify to participate in the criminal trial of the accused in the scope recognized by the law, and also the **VPA** by having their views and concerns considered by the court. It is well within the law in this case for the victims to participate in terms of adducing evidence as contemplated under **section 9** and **13**, but only to the extent that such participation does not compromise the accused persons' right to fair trial and the fair trial. Adducing of evidence must also be within the rules of evidence as set out in the **Evidence Act.**"

18. This authority is persuasive to this court and I therefore find and hold that the law society, the wife, children, parents and siblings of the deceased are victims within the definition of the Victim Protection Act and are therefore entitled to be heard at this stage of the proceeding called to only raising their concern as to whether the accused person ought to be admitted to bond only and no further than that.

19. The court is alive to the fact that it is required to ensure that the said participation does not affect or prejudice the right of the accused to free and fair trial. It is not the number of the counsels the accused is likely to meet which is to be considered as submitted by Dr. Khaminwa on the basis of equality of own but that the participation of victims at this stage of proceedings does not affect or prejudice the right of the accused.

20. I therefore find no merit on the objection herein which I hereby dismiss and will allow the victim through their Advocates limited participation at this stage of the proceedings to raise their concern and or objection to the release of the accused on bond only.

DATED, SIGNED and DELIVERED at Nairobi this 1st day of February, 2018

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Meroka for the State

Dr. Khaminwa SC for the accused

Mr. Ongaro for LSK

Mr. Litoro and Hira Kago for wife/child and Hira Kago

No appearance by Mr. Omari

Accused present

Court clerk Tabitha